

Chicago-Kent College of Law

Scholarly Commons @ IIT Chicago-Kent College of Law

All Faculty Scholarship

Faculty Scholarship

February 2006

The Lamentable Notion of Indefeasible Presidential Powers: A Reply to Professor Prakash

Harold J. Krent

IIT Chicago-Kent College of Law, hkrent@kentlaw.iit.edu

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/fac_schol



Part of the [President/Executive Department Commons](#)

Recommended Citation

Harold J. Krent, *The Lamentable Notion of Indefeasible Presidential Powers: A Reply to Professor Prakash*, 91 Cornell L. Rev. 1383 (2006).

Available at: https://scholarship.kentlaw.iit.edu/fac_schol/345

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact jwenger@kentlaw.iit.edu, ebarney@kentlaw.iit.edu.

ESSAY

THE LAMENTABLE NOTION OF INDEFEASIBLE PRESIDENTIAL POWERS: A REPLY TO PROFESSOR PRAKASH

Harold J. Krent[†]

In his thoughtful review of my book, *Presidential Powers*,¹ Professor Sai Prakash cogently criticizes its failure to attempt a taxonomy of when Congress can regulate or interfere with the exercise of presidential powers prescribed in Article II of the Constitution.² Professor Prakash is on the mark.³ Charitably, he notes that my omission follows on the failings of almost all other major writers in the field.⁴ Commentators have paid scant attention to this fundamental issue. Instead, they have focused, as I have, on understanding the determinants of a President's powers under the Constitution or on the appropriate accommodation between presidential and legislative powers in particular circumstances, such as in foreign affairs⁵ or for judicial appointments.⁶ Given the extensive clashes between Presidents and Congresses, particularly in the last sixty years,⁷ understanding the framework within which to assess these recurring conflicts is critical.

[†] Dean and Professor, Chicago-Kent College of Law. I would like to thank Bill Marshall for his perceptive comments on an earlier draft.

¹ HAROLD J. KRENT, *PRESIDENTIAL POWERS* (2005).

² Saikrishna Prakash, *Regulating Presidential Powers*, 91 CORNELL L. REV. 215 (2005). Professor Prakash does not distinguish among congressional actions that impinge on, interfere with, or directly regulate presidential powers. I agree with his implicit determination that such terms are interchangeable. Moreover, the analysis should not turn on congressional intent. Rather, the key is whether the enactment impermissibly divests the President of Article II authority.

³ Worse yet, Professor Prakash persuasively points out that what little there is in my book in the way of analysis of congressional regulatory efforts is not even consistent. *See id.* at 223–25.

⁴ *See id.* at 216 n.2.

⁵ *See, e.g.*, CECIL V. CRABB, JR. & PAT M. HOLT, *INVITATION TO STRUGGLE: CONGRESS, THE PRESIDENT AND FOREIGN POLICY* (4th ed. 1992); LOUIS FISHER, *PRESIDENTIAL WAR POWERS* (1995); LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* (1990).

⁶ *See, e.g.*, HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS* (1999); MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* (2001).

⁷ Such conflicts have always arisen, *see* KRENT, *supra* note 1, at 12–16, but they grew in intensity and frequency in the latter part of the twentieth century during the Reagan and Clinton administrations and have resurfaced with a vengeance during the current Bush reign. *See id.* at 15–16.

Professor Prakash then provides a great service in exploring four possible ways to understand Congress's ability to regulate or confine a President's exercise of constitutionally grounded powers.⁸ First, he assesses the theory that Congress enjoys plenary authority to regulate presidential powers under the Necessary and Proper Clause.⁹ Next, he considers whether Congress can regulate peripheral executive authority while leaving the core untouched.¹⁰ Third, he focuses on whether Congress can regulate all presidential powers as long as such regulation is reasonable and moderate.¹¹ Finally, Professor Prakash asks whether executive powers should instead be understood as infeasible in the sense that the President can exercise authority under Article II irrespective of legislation.¹² Professor Prakash advocates this last position and dedicates the bulk of the review to sketching a normative defense for that option.¹³

According to Professor Prakash, Congress cannot regulate any presidential powers because the structure of Article II as well as the original understanding of executive power leave no room for congressional tinkering with the exercise of presidential powers such as appointments or foreign affairs.¹⁴ He limits his theory somewhat when he recognizes that the President's authority over law execution may require accommodation of congressional preferences as reflected in legislation, and that the vesting of the appropriations power in Article I can have the effect of limiting presidential powers as well.¹⁵

In this Essay, I challenge Professor Prakash's proposal on both analytical and normative grounds. Professor Prakash's argument founders on an artificial dichotomy between "executive" and "legislative" powers. He portrays a world in which particular powers belong to one camp or the other, either legislative or executive. To him, therefore, characterizing a particular power as either legislative or executive has tremendous importance. For instance, if everything to do with appointments can be labeled as executive, then a congressional determination to lengthen a term of office from ten to fifteen years might be seen as unconstitutionally regulating the President's Article II power to appoint an officer to that position. On the other hand, the power to set the length of a term of office can just as readily be viewed as stemming from the congressional authority under Article I to provide for how to establish an office. Professor Prakash's view pre-

⁸ See Prakash, *supra* note 2, at 232-49.

⁹ See *id.* at 232-36.

¹⁰ See *id.* at 236-37.

¹¹ See *id.* at 237-39.

¹² See *id.* at 240-49.

¹³ See *id.* at 231, 240-51.

¹⁴ See *id.* at 240-49.

¹⁵ See *id.* at 249-56.

cludes considering particular powers as belonging to both branches. If one accepts the possibility of unavoidable clashes between the two branches, Professor Prakash's absolutist position makes little sense.

In the next section, I describe why Professor Prakash's absolutist position would undermine the system of checks and balances that most commentators find so fundamental and original in the constitutional system of separated powers.¹⁶ By labeling a power as indefeasibly executive, whether firmly entrenched in the Constitution or not, a President could act without recourse to Congress, unless he needs its political support for the action. The President would be within his constitutional rights to ignore any congressional effort to channel or limit his exercise of power, whether in the foreign or domestic realm. That view sunders the basic structure of congressional-executive relations set forth in *Youngstown Sheet & Tube v. Sawyer*¹⁷ and would license Presidents to take action unilaterally in every area conceived of as "executive," irrespective of congressional direction to the contrary.

In the final section, I take tentative steps to chart out a different understanding of how to approach clashes between the legislative and executive branches.¹⁸ Given what I believe to be the inevitable conflicts between congressional exercise of authority and executive power, some means of resolving such clashes must be devised, particularly given that courts, when confronted with properly drawn cases and controversies, must umpire these disputes. Although I offer no radical departure from current practice, I advocate reorienting the test to focus on the critical checks and balances function in the Constitution. Thus, any congressional enactment that would rob the President of a veto power, such as attempted legislation through a two-house resolution, should be presumptively invalid. Similarly, almost all congressional efforts to regulate the President's pardon power should be rejected, even though Congress clearly has the authority to determine how long individuals should be incarcerated for committing particular crimes. The Constitution vests the pardon power in the President as a check on congressional sentencing policy and judicial application of that policy.¹⁹ Congressional enactments that in-

¹⁶ See *infra* Part II.

¹⁷ 343 U.S. 579 (1952).

¹⁸ See *infra* Part III.

¹⁹ U.S. CONST. art. II, § 2. By the same token, presidential measures that would undermine Congress's impeachment option, such as an argument that impeachment cannot be used unless the executive branch first convicts the officer of a "High Crime or misdemeanor," should similarly be presumptively rejected in light of the pivotal checking function of impeachments. Professor Prakash's review, which focuses only on congressional incursions into the President's authority, misses that such conflicts must be assimilated into the larger domain of all separation-of-powers conflicts, whether presidential incursions into Congress's realm or judicial usurpations of executive authority. See *infra* notes 63-64 and accompanying text.

trude into the President's Commander-in-Chief power, whether by altering the draft or limiting the use of particular weapons systems, cannot be seen as presumptively unconstitutional. In such cases, because a critical checking function is not directly threatened, courts must accommodate the respective powers as best they can, based on the conventional tools of constitutional text, history, and structure. Nonetheless, shifting the balancing test to focus not on a weighing of the interests but on the importance of preserving the system of checks and balances prescribed in the Constitution brings at least some order to the ad hoc approach used today.

I

According to Professor Prakash, Congress cannot regulate presidential powers because Congress lacks any constitutionally rooted authority to impinge on presidential prerogatives.²⁰ I fully agree with Professor Prakash that Congress cannot, under the Necessary and Proper Clause or any other constitutional provision, exercise the unfettered power to regulate presidential powers. As he suggests, Congress cannot ban pardons by lame-duck Presidents.²¹ Neither can Congress preclude presidential appointment to federal office of sitting federal judges nor bar presidential veto of appropriations measures.²² Article I does not afford Congress a roving power to choose which powers to allow a President to exercise.

Nonetheless, Professor Prakash dismisses congressional power to affect executive power under the Necessary and Proper Clause far too readily.²³ If one asks whether Congress directly can limit a presidential power such as appointments through the Necessary and Proper Clause, the answer must be no. However, if one asks instead whether the Necessary and Proper Clause permits Congress to carry into execution one of its *own* powers, such as the power to determine how best to structure the Department of Homeland Security or to provide for labor-management relations, then the authority to set qualifications for offices in those fields appears in a different light. The power to set qualifications no longer regulates a President's appointment power but instead ensures that an experienced administrator follows through on Congress's policies. Similarly, Congress routinely decides whether to delegate authority to the Secretary of State as opposed to the Secretary of Defense, whether to delegate to particular agencies

²⁰ See Prakash, *supra* note 2, at 231.

²¹ See *id.* at 226.

²² See *id.* at 231.

²³ See *id.* at 232 ("Although the Necessary and Proper Clause may be the best candidate for a source of generic authority to regulate powers granted to others, it is nonetheless an extremely weak candidate.").

the power to engage in regulation or rulemaking, and whether congressional prohibitions should be enforced through crimes, injunctions, or both. Thus, although I agree with Professor Prakash that the Constitution does not grant to Congress under the Necessary and Proper Clause the power to rearrange whatever powers are granted to the President under Article II, the Constitution does confer on Congress the authority to specify how laws should be executed. That specification can trench on presidential prerogatives, whether in the domestic or foreign realm.

Consider an example not addressed by Professor Prakash. The Supreme Court has held that presidential privilege exists under Article II even though it is not provided for explicitly.²⁴ Congress can request information from a President under the Necessary and Proper Clause that may implicate presidential privilege even though the information is highly relevant to a matter within Congress's purview.

²⁴ See, e.g., *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 439 (1977). Some have argued that Congress can regulate presidential powers that are implicit in Article II, such as presidential privilege, but cannot touch those that lie more firmly entrenched in the text, such as the Commander-in-Chief power. See, e.g., Michael E. Solimine, *Nepotism in the Federal Judiciary*, 71 U. CIN. L. REV. 563 (2003); Michael L. Yoder, Note, *Separation of Powers: No Longer Simply Hanging in the Balance*, 79 GEO. L.J. 173 (1990). Justice Anthony Kennedy had suggested this possible approach in *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440 (1989) (Kennedy, J., concurring), a case questioning whether Congress can force a federal advisory group to meet in the open when the group is to advise the President on appointments. Justice Kennedy differentiated situations in which Congress should have no role, such as when the open meeting requirement directly undermined a textually grounded right under Article II, from those in which a congressional enactment merely shaped a more attenuated executive interest, such as privilege or the President's removal authority over officers of the United States. See *id.* at 481–87. In the former context, “[w]here a power has been committed to a particular Branch of the Government in the text of the Constitution, the balance already has been struck by the Constitution itself.” *Id.* at 486.

I agree with Professor Prakash that any such approach is fundamentally misguided. Consider the removal power of the President. U.S. CONST. art. II, § 2, cl. 2. The Constitution is silent as to whether the President has the power to remove at will executive officials. Nonetheless, despite that omission, Presidents and members of Congress since the Washington administration have believed that the President's removal power is constitutionally based, even though there have been disputes as to whether Congress can limit the removal power over particular categories of officials. See KRENT, *supra* note 1, at 37–39. Whether a power is lodged specifically in the text of Article II does not speak to whether Congress has any policymaking role in that arena. Moreover, much exercise of executive authority that is textually based can only be derived by inference. For instance, although the Constitution lodges the pardon power in the President, it says nothing of the power of the President to attach conditions to its exercise. See *id.* at 205–13. Should that attribute of the pardon power, because unstated, be subject to more congressional regulation than the unconditional exercise of the pardon authority? Consider as well the many powers that Presidents have sought to exercise under the Commander-in-Chief power. We know that some Commander-in-Chief power exists, but does it include the power to seize steel mills or conduct warrantless surveillance? See, e.g., *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952). The degree that a particular presidential exercise of power can be traced to the constitutional text does not provide a meaningful way to understand when Congress can regulate or impinge upon presidential powers. There is no way to separate constitutional powers into regulable and nonregulable categories.

For instance, Congress's past regulation of presidential papers under the Presidential Recordings and Materials Preservation Act²⁵ inevitably clashed with executive privilege but simultaneously responded to issues legitimately within Congress's domain.²⁶ The Supreme Court in *Nixon v. Administrator of General Services*²⁷ ultimately resolved this issue in Congress's favor but only after articulating a balance between legislative and executive power: "[T]he extent to which [a statute] prevents the Executive Branch from accomplishing its constitutionally assigned functions"²⁸ can only be "justified by an overriding need to promote objectives within the constitutional authority of Congress."²⁹ Congress through Article I may legislate in a way that appears to undermine presidential prerogatives.³⁰

Professor Prakash is of course correct that there may be times when congressional requests do not relate to issues within Congress's constitutional competence.³¹ For instance, when the Senate requested documents of President Grover Cleveland pertaining to a suspended official, President Cleveland refused to comply on the ground that the Senate lacked the power to investigate the President's exercise of the removal power, which was his alone under the Constitution.³² Similarly, the House of Representatives cannot demand papers from the President relating to negotiating treaties³³ given that it is only the Senate and not Congress as a whole that plays a role in treaty ratification.³⁴ These examples of congressional requests outside Congress's constitutional reach, however, are rare.

Just as congressional regulation of information may trench on presidential privilege, Congress through the Necessary and Proper Clause may regulate in a way that implicates other presidential powers under Article II. The answer cannot be that Congress has no business regulating presidential powers; the answer must instead turn on how to accommodate a legitimate exercise of congressional power under the Necessary and Proper Clause when presidential powers thereby are implicated.

²⁵ Pub. L. No. 93-526, 88 Stat. 1695 (1974) (codified as amended at 44 U.S.C. § 2111 (2000)).

²⁶ See KRENT, *supra* note 1, at 179-80.

²⁷ 433 U.S. 425 (1977).

²⁸ *Id.* at 443.

²⁹ *Id.* But see Saikrishna Bangalore Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143 (1999) (questioning the legitimacy of executive privilege on originalist grounds).

³⁰ See *Nixon*, 433 U.S. at 513-14.

³¹ See, e.g., Prakash, *supra* note 2, at 245-46.

³² See KRENT, *supra* note 1, at 177.

³³ See, e.g., Prakash, *supra* note 29, at 1182.

³⁴ U.S. CONST. art. II, § 2, cl. 2.

Indeed, that is precisely what the Supreme Court has attempted to do in the cases it has adjudicated that involve an overlap of congressional and executive powers.³⁵ Although I agree with Professor Prakash that the Court's analysis ultimately is unsatisfactory, the Court's struggles should not militate for adoption of a strong default rule in favor of the President.

The most famous case to date remains *Youngstown Sheet & Tube Co. v. Sawyer*.³⁶ In response to a threatened nationwide steel strike, President Harry Truman issued an Executive Order on April 8, 1952, directing the Secretary of Commerce to seize and operate most steel plants.³⁷ President Truman based the Order not on any statute but on his constitutional authority to "take care that the laws be faithfully executed"³⁸ and to act as Commander in Chief of the Armed Forces.³⁹ President Truman feared that a strike would shut down the steel mills and hurt the nation's war efforts on the Korean Peninsula.⁴⁰ The steel companies immediately sought injunctive relief.⁴¹ As the transcript from the oral argument reveals, the President argued in part that he had the right to take the plant under his reading of the Commander-in-Chief power:

The Court: And is it . . . your view that the powers of the Government are limited by and enumerated in the Constitution of the United States?

Mr. Baldrige: That is true, Your Honor, with respect to legislative powers.

The Court: But it is not true, you say, as to the Executive?

Mr. Baldrige: No.

The Court: So, when the sovereign people adopted the Constitution, it enumerated the powers set up in the Constitution but limited the powers of the Congress and limited the powers of the judiciary, but it did not limit the powers of the Executive. Is that what you say?

Mr. Baldrige: That is the way we read Article II of the Constitution.⁴²

³⁵ See *infra* notes 100–16 and accompanying text.

³⁶ 343 U.S. 579 (1952).

³⁷ Exec. Order No. 10,340, 17 C.F.R. 3139 (1952).

³⁸ U.S. CONST. art. II, § 3, cl. 1.

³⁹ U.S. CONST. art. II, § 2, cl. 1.

⁴⁰ See MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER 126 (1977).

⁴¹ *Youngstown*, 343 U.S. at 583.

⁴² J. MALCOLM SMITH & CORNELIUS P. COTTER, POWERS OF THE PRESIDENT DURING CRISES 135 (1960).

President Truman, as would Professor Prakash many years later,⁴³ read Article II as absolutist, tolerating no congressional interference with the President's authority as Commander in Chief.⁴⁴

Although the Justices were unable to agree on any one line of analysis, the Court disavowed President Truman's position, largely because his action impermissibly departed from the path previously set by Congress in the National Labor Relations Act, commonly known as the Taft-Hartley Act.⁴⁵ The concurring opinions of Justices Harold Burton⁴⁶ and Felix Frankfurter⁴⁷ in particular stressed that Congress had previously qualified the President's authority to determine when and where to authorize the seizure of property in meeting such emergencies.⁴⁸ Congress's articulation of policy objectives and its specification of the means for implementing those policies directly constrain presidential power. After all, Congress had the authority to regulate labor-management relations under the Commerce Clause.

In the most famous opinion of the *Youngstown* case, Justice Robert H. Jackson concurred in the result based on a type of balancing test.⁴⁹ He acknowledged a realm of inherent executive authority.⁵⁰ Even when Congress had acted to channel executive authority, Justice Jackson suggested that Presidents *might* be able to exercise extra-statutory powers.⁵¹ Justice Jackson reasoned that presidential powers are not fixed but fluctuate, depending on congressional action or inaction.⁵² He continued that the authority of the chief executive is at its height when the chief executive acts in accordance with an order from Congress or an implied command from Congress.⁵³ In the middle is a "Zone of Twilight" within which both the President and Congress can act concurrently.⁵⁴ The President may use this middle ground when Congress has been silent.⁵⁵ The third and weakest point for a President to act is when the President takes measures incompatible with the expressed or the implied will of Congress.⁵⁶ Justice Jackson's test contemplated that Congress will often legislate in such a way

⁴³ See Prakash, *supra* note 2, at 231, 240–51.

⁴⁴ See, e.g., 98 CONG. REC. H4192 (daily ed. Apr. 21, 1952) (statement of President Harry S. Truman); 98 CONG. REC. H3962 (daily ed. Apr. 9, 1952) (statement of President Harry S. Truman).

⁴⁵ 343 U.S. at 589.

⁴⁶ *Id.* at 655–60 (Burton, J., concurring).

⁴⁷ *Id.* at 589 (Frankfurter, J., concurring).

⁴⁸ See *id.* (Frankfurter, J., concurring); *id.* at 659 (Burton, J., concurring).

⁴⁹ See *id.* at 635–38 (Jackson, J., concurring).

⁵⁰ See *id.* at 656–71 (Jackson, J., concurring).

⁵¹ See *id.* at 635 n.2 (Jackson, J., concurring).

⁵² See *id.* at 635 (Jackson, J., concurring).

⁵³ See *id.* (Jackson, J., concurring).

⁵⁴ See *id.* at 637 (Jackson, J., concurring).

⁵⁵ See *id.* (Jackson, J., concurring).

⁵⁶ See *id.* (Jackson, J., concurring).

as to impinge upon presidential powers.⁵⁷ The key, according to Justice Jackson, was to shape a way to resolve the conflict between Congress and the President, which his framework attempted in part.⁵⁸ Although the Court has not always adhered to the *Youngstown* approach in subsequent cases, the point is that the Court has had to accommodate powers of the respective branches on numerous occasions. Labeling all executive powers as indefeasible does not provide a feasible way out.

Moreover, despite his absolutist views, Professor Prakash seems to realize the need for accommodation.⁵⁹ He acknowledges a wide swath of congressional power to “specify the means and methods of law execution.”⁶⁰ He concedes that Congress, when it provides for the frequency or manner in which a law is to be enforced, is not interfering with the President’s power to “take Care that the Laws be faithfully executed”⁶¹ so much as it is exercising its own power “to dictate the means of execution.”⁶² The same, however, is true when Congress exercises its legislative authority in a way that trenches upon a correlative executive power in Article II.

Finally, Professor Prakash writes as if separation of powers conflicts arise only out of congressional intrusions into presidential powers, but of course the obverse is true as well. The practices of executive agreements and presidential abrogation of treaties both may encroach upon the Senate’s province to approve treaties.⁶³ The President’s exercise of a pocket veto or recess appointment authority may impinge on the powers of Congress. Moreover, the President’s seizure of the steel mills in *Youngstown* flew in the face of a congressional enactment that had prescribed what steps to take in an emergency.⁶⁴ Professor Prakash does not tell us whether such presidential actions are categorically unconstitutional in light of their intrusion into the powers reserved to Congress under Article I. I doubt he thinks so, which only accentuates the limits of an absolutist approach. Conflicts are inevitable, and some accommodations must be made. Rigid demarcation among the branches by function cannot work.

II

Nor would an absolutist understanding of the constitutional structure be normatively attractive. The Constitution can best be un-

⁵⁷ See *id.* at 645 (Jackson, J., concurring).

⁵⁸ See *id.* (Jackson, J., concurring).

⁵⁹ See Prakash, *supra* note 2, at 249–50.

⁶⁰ *Id.* at 250.

⁶¹ U.S. CONST. art. II, § 3.

⁶² Prakash, *supra* note 2, at 251.

⁶³ See KRENT, *supra* note 1, at 96–102, 106–08.

⁶⁴ See 39 Op. Att’y Gen. 348 (1939).

derstood not as carving up powers and labeling some “legislative,” some “executive,” and some “judicial,” but rather as prescribing a relational framework under which all the branches must act. As an example, only Congress has the power to pass laws,⁶⁵ but Presidents participate in legislation by offering bills for Congress to consider, by vetoing legislation, and by filling in the gaps in laws when applying or enforcing them in particular contexts.⁶⁶ Similarly, although the function of judges under Article III is to interpret and apply the law in resolving cases and controversies,⁶⁷ Presidents must interpret the law in carrying out the terms of both treaties and statutes.⁶⁸ Presidents determine which treaties are best for the nation, but so does the Senate.⁶⁹ Both Congress and the President have roles in preparing the nation for war.⁷⁰ As Justice Jackson stated in *Youngstown*, “the actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context.”⁷¹ The Constitution does not provide any branch with a monopoly on particular functions or issues.

The constitutional system of separation of powers, therefore, turns not on separating functions but on creating a system of checks and balances.⁷² The Constitution places restraints on how each branch must act, including the Executive. The executive branch generally can only enforce those laws that Congress enacts,⁷³ bind the nation to treaties should two-thirds of the Senate concur,⁷⁴ and spend sums appropriated by Congress.⁷⁵ Understanding the basic constitutional structure of overlapping powers does not yield easy answers when the powers of Congress and the President collide, but it does help explain why these powers collide, and it provides a background norm of checks and balances, which is critical to understanding our system of separated powers.

What frightens me about Professor Prakash’s absolutist position is the invitation to Presidents to ignore those checks and balances.

⁶⁵ See U.S. CONST. art. I, § 8, cl. 18.

⁶⁶ See U.S. CONST. art. II, § 2.

⁶⁷ See U.S. CONST. art. III, § 2, cl. 1.

⁶⁸ See U.S. CONST. art. II, § 2.

⁶⁹ See KRENT, *supra* note 1, at 2.

⁷⁰ See U.S. CONST. art. I, § 8; U.S. CONST. art. II, § 2.

⁷¹ 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

⁷² See, e.g., *Morrison v. Olson*, 487 U.S. 654, 693 (1998) (stating that the system of checks and balances established by the Framers serves as a “self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other” (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976))).

⁷³ See U.S. CONST. art. II, § 2.

⁷⁴ See *id.*

⁷⁵ See *id.*

Under Professor Prakash's view, other than for reasons of politics, Presidents need not heed any legislation that trenches upon a power exercised by Presidents under the Constitution. Although Professor Prakash does not provide many examples, President Truman, in his view, may have been right to seize the steel mills and ignore the Taft-Hartley Act's procedural framework because he was acting through his power as Commander in Chief. Presidents Ronald Reagan and George H. W. Bush may have been justified in ignoring the War Powers Act in sending troops to Lebanon and Panama, respectively.⁷⁶ More recently, George W. Bush's administration may have been correct when it claimed that the Commander-in-Chief Clause empowered the President to authorize torture, irrespective of congressional views.⁷⁷ To be sure, some of the preceding congressional efforts may be unconstitutional. However, Presidents should be reminded that the constitutional call is not theirs alone. Officers in all three branches take an oath to honor the Constitution. Acknowledging the almost inevitable prospect for clashes among the branches provides greater incentive for cooperation among the branches and may inculcate greater caution as well.

At the time of this writing, President George W. Bush propounded the view that the Constitution authorized him to order wire-tapping of individuals in the United States without a warrant and without any need for *ex ante* or *ex post* judicial approval. In many ways, *Youngstown* provides a close analogy, for the question there was whether the Commander-in-Chief power authorized seizure of the steel mills to quell labor strife and facilitate the war effort in Korea.⁷⁸ What steps, however, could the President not take domestically in the name of defending the country under this view of Article II? If the Commander-in-Chief power permits unilateral seizure of steel mills, does it permit unilateral imposition of the draft? Unilateral deportation of those the President deems too great a risk given the ongoing war?⁷⁹ Use of armed forces to unearth terrorist activity domestic-

⁷⁶ See KRENT, *supra* note 1, at 118–20.

⁷⁷ See President's Statement on Signing of H.R. 2863, the "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006," 41 WEEKLY COMP. PRES. DOC. 1918 (Dec. 30, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html> [hereinafter Bush Press Conference]; see also Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 172, 200–07 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) (asserting that the President's exercise of authority pursuant to the Commander-in-Chief Clause cannot be circumscribed by Congress).

⁷⁸ 343 U.S. 579 (1952).

⁷⁹ With respect to the Bush administration's view as to its unilateral control over enemy combatants, see Brief for the Petitioner at 48, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004)

ally?⁸⁰ Along with the war on terrorism, what steps can be taken in the war on drugs? How can the Commander-in-Chief power be seen as absolute?

Moreover, the wiretapping raises a separate critical question: assuming that the President's Commander-in-Chief power sweeps so broadly, can the President nonetheless ignore congressional efforts to channel or redirect the surveillance program? Congress under the Foreign Intelligence Surveillance Act⁸¹ in authorizing broad investigative measures against terrorism had set limits on surveillance. Ironically, although commentators had questioned the constitutionality of the Act for diluting Fourth Amendment guarantees,⁸² those same lax procedural requirements⁸³ evidently persuaded President Bush that the Act encroached on his Commander-in-Chief power to take action in the country's best interests.⁸⁴

Congress under Article I plainly enjoys the power to decide what measures the government should take against its enemies within and abroad.⁸⁵ Congress has passed a Trading With the Enemy Act,⁸⁶ numerous immigration laws,⁸⁷ covert intelligence acts,⁸⁸ and, more recently, a ban on torture.⁸⁹ In so doing, Congress is not chipping away

(No. 03-1027), available at <http://www.usdoj.gov/osg/briefs/2003/3mer/2mer/2003-1027.mer.aa.pdf>.

⁸⁰ Such use of the Commander-in-Chief power would violate the terms of the Posse Comitatus Act. 18 U.S.C. § 1385 (2000).

⁸¹ Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified in scattered sections of the U.S.C.), amended by Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of 18 U.S.C.).

⁸² See, e.g., Jeremy D. Mayer, *9-11 and the Secret FISA Court: From Watchdog to Lapdog?*, 34 CASE W. RES. J. INT'L L. 249, 250-51 (2002); Justin Sandberg, *The Need for Warrants Authorizing Foreign Intelligence Searches of American Citizens Abroad: A Call for Formalism*, 69 U. CHI. L. REV. 403, 407-09 (2002).

⁸³ Defense counsel never see FISA warrants, government agents do not need to report back to the FISA court as to their efforts to minimize the invasions of privacy, and proceedings of the court are not published. See Nola K. Breglio, Note, *Leaving FISA Behind: The Need to Return to Warrantless Foreign Intelligence Surveillance*, 113 YALE L.J. 179 (2003). No government application for a warrant under FISA was denied in the first twenty-five years of its existence. See Helene E. Schwartz, *Oversight of Minimization Compliance Under the Foreign Intelligence Surveillance Act: How the Watchdogs Are Doing Their Jobs*, 12 RUTGERS L.J. 405, 445 n.235A, 446 n.239 (1981).

⁸⁴ See Bush Press Conference, *supra* note 77.

⁸⁵ See U.S. CONST. art. I, § 8.

⁸⁶ 50 U.S.C. app. §§ 1-44 (2000).

⁸⁷ See, e.g., REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231, 302 (to be codified in scattered sections of 8 and 49 U.S.C.); Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

⁸⁸ See, e.g., Intelligence Authorization Act of 1991, 50 U.S.C. § 413 (2000). Congress has also provided a framework for the exercise of presidential powers in an emergency. National Emergencies Act of 1976, 50 U.S.C. §§ 1601-51 (2000).

⁸⁹ See McCain Amendment, Pub. L. No. 109-148, 119 Stat. 2680 (2005).

at presidential powers but affirming its own Article I duty to pass laws to protect the nation's security. It cannot be that such legislation is void in the time of war. The President as Commander in Chief does not wield a dispensation power.

One of the Supreme Court's earliest decisions in fact arose out of a conflict between congressional and presidential powers in the quasi war between the United States and France in the last years of the eighteenth century.⁹⁰ In *Little v. Barreme (The Flying Fish)*,⁹¹ the Court held that the President's directive to seize a ship on the high seas was unlawful because Congress, had not authorized such action even though it had legislated in the area:

It is by no means clear that the president of the *United States* whose high duty it is to "take care that the laws be faithfully executed," and who is commander in chief of the armies and navies of the *United States*, might not, without any special authority for that purpose . . . have empowered the officers commanding the armed vessels of the *United States*, to seize and send into port for adjudication [the suspect vessels]. But when it is observed that [an Act of Congress] gives a special authority to seize on the high seas, and limits that authority . . . the legislature seems to have prescribed . . . the manner in which this law shall be carried into execution⁹²

The Supreme Court therefore has long recognized the critical role of Congress in setting foreign policy even when confronting hostile foreign powers.

Congress shares with the President the power to protect our nation in time of war.⁹³ The Constitution lodges in Congress not only the authority to declare war⁹⁴ but also to raise armies,⁹⁵ equip armies,⁹⁶ regulate "the land and naval Forces,"⁹⁷ and, in an emergency, suspend the writ of habeas corpus.⁹⁸ Congress can and has determined what type of weapons systems to develop. Thus, because the prospect of the war on terrorism is so open ended, cabining the authority of the President to justify a whole litany of measures under the Commander-in-Chief Clause is of critical importance.

Unquestionably, legislation may intrude too far into the President's Commander-in-Chief power, and, furthermore, I agree with Professor Prakash that the Executive enjoys a realm of inherent au-

⁹⁰ *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

⁹¹ *Id.*

⁹² *Id.* at 177-78.

⁹³ See U.S. CONST. art. I, § 8.

⁹⁴ *Id.* art. I, § 8, cl. 11.

⁹⁵ *Id.* art. I, § 8, cl. 12.

⁹⁶ *Id.*

⁹⁷ *Id.* art. I, § 8, cl. 14.

⁹⁸ U.S. CONST. art. I, § 9, cl. 2.

thority. Yet, that is precisely why some accommodation between congressional and executive power is needed, and the form of that accommodation is not apparent from the constitutional design. To ignore the congressional role is to afford the President too much of a blank check to revamp the entire nation in his image: Congress under Article I is to be the principal policymaker of the nation, whether in matters of internal security or foreign affairs.

III

The question to be answered, then, is how to evaluate clashes among the branches. Professor Prakash is correct that the Supreme Court has not provided clear guidance on how to accommodate congressional and executive powers.⁹⁹ *Youngstown* addressed the issue only obliquely.¹⁰⁰ Justice Hugo Black's opinion for the Court essentially denied any inherent authority for the President,¹⁰¹ and Justice Jackson's famed opinion does not instruct how to accommodate congressional and executive powers, just that presidential assertions of inherent executive power are less likely to prevail in the face of a conflict.¹⁰²

In *Nixon v. Administrator of General Services*,¹⁰³ the Court assessed the conflict more directly.¹⁰⁴ In upholding the congressional regulatory scheme under a general balancing test, it weighed the importance of the congressional interest in preserving presidential papers against the potential intrusion into the President's ability under Article II to obtain candid, frank advice.¹⁰⁵ *Nixon* frames the issue correctly but stops short of providing any guidance as to weighing the importance to Congress against the intrusion on the Executive.¹⁰⁶

⁹⁹ See, e.g., Prakash, *supra* note 2, at 229 (describing the Supreme Court's "laissez-faire attitude towards congressional regulation of executive power").

¹⁰⁰ 343 U.S. 579, 585–89 (1952).

¹⁰¹ See *id.* at 587–89.

¹⁰² See *id.* at 640 (Jackson, J., concurring).

¹⁰³ 433 U.S. 425 (1977).

¹⁰⁴ See *id.* at 441–43.

¹⁰⁵ See *id.* at 443–46.

¹⁰⁶ In separation of powers cases overall, the Court has seemingly vacillated between functional and formal approaches. *Nixon* and others manifest a functional approach in attempting to weigh the respective interests, while *INS v. Chadha*, 462 U.S. 919 (1983), and *Bowsher v. Synar*, 478 U.S. 714 (1986), reflect a more formal approach in identifying whether a particular function can be exercised by Congress. See generally M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603 (2001) (arguing that neither a functional nor a formal approach to resolving separation-of-powers controversies is sound); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987) (addressing formal and functional approaches to resolving separation-of-powers controversies).

Professor Prakash is appropriately skeptical that it is meaningful to ask whether an intrusion is “reasonable.”¹⁰⁷ Some powers may be vested in the President without reference to any reasonableness criterion, such as the power to nominate officers. It is for the President to make reasonable or unreasonable choices. Similarly, a congressional requirement that all who receive a pardon must first admit their guilt may seem reasonable, but that policy determination is for the President alone.¹⁰⁸ A reasonableness inquiry is problematic for a further and more fundamental reason: It has no referent in the Constitution. In other words, if the powers in the Constitution must be accommodated, the accommodation should stem from some criterion intrinsic to the Constitution. As with other reasonableness inquiries, judges have few benchmarks other than their own policy preferences to ascertain whether a particular intrusion is reasonable.

The Court took a slight turn in *Morrison v. Olson*.¹⁰⁹ There, the Court focused not as much on balancing as gauging whether the congressional interference eroded too much executive power.¹¹⁰ The question presented was whether Congress under the former Ethics in Government Act permissibly vested in an independent counsel the power to investigate allegations of wrongdoing against executive branch officials.¹¹¹ The Court held that congressional intrusions would be upheld if the President retained “sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties.”¹¹² In applying the test, the Court noted that the independent counsel’s jurisdiction was narrow,¹¹³ its impact upon government-wide policy modest,¹¹⁴ and that the Attorney General could remove the official for any misconduct.¹¹⁵ The Court eschewed a straightforward balance in favor of an assessment into the degree of intrusion into executive power.¹¹⁶

The objection to the *Morrison v. Olson* test is similar to the criticism of the approach taken in *Nixon*. The question should not be whether the President has sufficient power to discharge his Article II functions, the question should be whether the particular congressional enactment comports with the Constitution. For instance, as Professor Prakash suggests, any intrusion into the pardon power may

¹⁰⁷ See Prakash, *supra* note 2, at 237.

¹⁰⁸ See *id.* at 238.

¹⁰⁹ 487 U.S. 654 (1988).

¹¹⁰ See *id.* at 685–94.

¹¹¹ See *id.* at 659–60.

¹¹² *Id.* at 696.

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ See *id.*

¹¹⁶ See *id.*

be unconstitutional even if the President is left with wide authority, but it may be that intrusion into the Executive's power to enforce the law should be permitted even if the enactment leaves the President with little role.¹¹⁷ The determinant should be the constitutional structure, not ad hoc determinations of sufficiency.

Accommodation among the branches should focus—when possible—on the role of the constitutional power infringed in maintaining the system of checks and balances under the Constitution. Almost all commentators agree that the defining aspect of our constitutional structure is its stress on checks and balances.¹¹⁸ In assessing the congressional intrusion, courts should thus not ask whether the intrusion is reasonable in light of the congressional objective, as in *Nixon v. Administrator of General Services*,¹¹⁹ nor ask whether the intrusion leaves the Executive with sufficient power to attain constitutional objectives, as in *Morrison v. Olson*.¹²⁰ Rather, the Court should first ask whether the clash threatens to undermine one of the critical checks and balances in the Constitution itself.¹²¹ I do not assert that the checks and balances inquiry is dispositive of all conflicts among the branches, but rather that a subset can be resolved in that fashion.¹²²

In a sense, the checks-and-balances prism proves too much given that nearly the entire allocation of powers is about checks and balances. Before a bill can become law, two separate Houses of Congress must approve it, present it to the President for his signature and, if vetoed, override the veto with a two-thirds vote. Furthermore, Congress creates offices, Presidents nominate officers with the Senate's consent, and Congress can limit appropriations for that agency or eliminate the office altogether. All steps along the way can be seen as distinct checks or balances.

¹¹⁷ See Prakash, *supra* note 2, at 225–26.

¹¹⁸ For a sampling, see 1 KENNETH DAVIS, *ADMINISTRATIVE LAW TREATISE* § 2.6 at 77–82 (2d ed. 1978); Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225; Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984).

¹¹⁹ 433 U.S. at 456–57.

¹²⁰ 487 U.S. at 696.

¹²¹ This is not to suggest that the system of checks and balances prescribed in the Constitution is the best system that can be established, or that it can easily be applied contemporarily given the changes in government over the last two hundred years. See Magill, *supra* note 106, at 658. Nonetheless, those checks undeniably played a key role in establishing the constitutional structure and are enshrined in the Constitution. See, e.g., THE FEDERALIST No. 51, at 321–22 (J. Madison) (Clinton Rossiter ed., 1961); THE FEDERALIST No. 73, at 442–43 (A. Hamilton).

¹²² I am apparently partial to partial resolution of the accommodations among the branches. See Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253 (1988) (arguing that a subset of conflicts among the branches can be resolved formally by confining each branch to its specified manner of acting).

Yet, some presidential powers perform a more fundamental role in a system of checks and balances than others do. Consider two relatively straightforward examples. First, the President's veto power unquestionably is a core component of the system of checks and balances. Congressional efforts to alter rights and duties via a two-House resolution should be presumptively unconstitutional. Congress provided in the Federal Trade Commission Improvements Act of 1980¹²³ that an FTC trade regulation defining deceptive acts would become effective unless both Houses of Congress disapproved it.¹²⁴ In *United States House of Representatives v. FTC*¹²⁵ the Supreme Court, under the authority of *INS v. Chadha*,¹²⁶ affirmed a lower court decision invalidating the provision.¹²⁷ Any congressional effort to bypass the President's veto power is particularly suspect. As the Court explained in *Chadha*, the presentment clause of the Constitution serves a critical role in preventing "oppressive, improvident, or ill-considered measures."¹²⁸ Although many believe that a two-House veto cannot be equated with a law, a veto—like a law—alters legal rights and duties without resort to presentment to the President.¹²⁹

Second, although not generally recognized as such, the President's pardon power similarly should be viewed as a critical check within the constitutional framework. The pardon authority tempers the possibly harsh criminal justice system established by Congress and sentencing mechanisms administered by the judiciary. No matter what the crime or the sentence, Presidents can allow an offender to walk free. This is not to suggest that the executive branch has the only

¹²³ 15 U.S.C. § 57a-1 (1982).

¹²⁴ 463 U.S. at 1218.

¹²⁵ 463 U.S. 1216 (1983).

¹²⁶ 462 U.S. 919 (1983).

¹²⁷ *Id.* at 928.

¹²⁸ *Id.* at 947–48.

¹²⁹ On the other hand, the President's ability to pocket veto a bill may not be as sacrosanct in that the Constitution recognizes only one instance in which the President can deprive Congress of the ability to override his veto, when "Congress by their Adjournment prevent its Return, in which Case it shall not be a Law." U.S. CONST. art. I, § 7, cl. 2. The Constitution requires that, before adjourning, Congress permit the President a ten-day period in which to veto or sign legislation. *Id.*

One related controversy grew out of Congress's effort to restrict military aid to El Salvador. *See, e.g., Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985), *vacated sub. nom. Burke v. Barnes*, 479 U.S. 361 (1987). Prior to adjourning, Congress appointed an agent authorized to receive veto messages during that period. *Id.* at 30. President Ronald Reagan claimed that the adjournment allowed him to prevent the bill from becoming law without the need for a veto. *Id.* at 25. The Court of Appeals for the District of Columbia held that the presence of the agent sufficed to allow the President sufficient time to consider whether to veto the bill. *Id.* at 35. Otherwise, the President by refusing to act on the bill could prevent it from becoming law and thereby circumvent Congress's ability to override a veto. *Id.* at 30. Although the Supreme Court never reached the issue, efforts to expand the pocket veto should be approached skeptically given the checking role of Congress in potentially overriding any veto.

say as to matters of punishment—far from it. Congress defines crimes and sets a sentencing range. Judges apply those ranges in sentencing. Presidential exercise of the pardon power can thwart the legislative determination that all convicted of a particular offense should serve a minimum amount of time in prison, or that parole not be offered to a class of offenders. A presidential pardon can also undermine a judicial determination as to the guilt or odiousness of a particular offender.

The Supreme Court's decision in *United States v. Klein*,¹³⁰ for example, arose from a general pardon issued by President Johnson in 1868 to enable southern sympathizers to make a claim on property abandoned to federal troops during the war.¹³¹ Victor Wilson, whose estate's administrator brought this action, had marked six hundred bales of cotton as property belonging to the Confederate States of America to assure their transit.¹³² Union agents, however, seized the cotton.¹³³ Legislation permitted any citizen of the southern states who was loyal to recover seized property or its monetary equivalent.¹³⁴ Wilson claimed that he was loyal and sought compensation and, after his death, his administrator brought suit in the Court of Claims.¹³⁵ The Court of Claims initially decided in favor of Wilson's estate,¹³⁶ but upon motion from the government reconsidered.¹³⁷ The court this time determined that Wilson had in fact been disloyal but refused to alter its \$125,300 verdict on the ground that President Johnson's issuance of a blanket pardon to Wilson and others similarly situated forced the court to consider him loyal as a legal matter.¹³⁸

Congress reacted by passing a statute providing that evidence of a pardon should be admissible *against* a pardoned claimant as an indicator of disloyalty.¹³⁹ The 1870 statute provided that certain pardons "shall be taken and deemed . . . conclusive evidence that such person did take part in and give aid and comfort to the late rebellion."¹⁴⁰ The Supreme Court in *Klein* invalidated the statute, explaining in part that, because Congress was attempting to redefine the consequences of a pardon, "[t]he rule prescribed is also liable to just exception

¹³⁰ 80 U.S. (13 Wall.) 128 (1871).

¹³¹ *Id.* at 131.

¹³² *Id.* at 132.

¹³³ *Id.*

¹³⁴ *Id.* at 128.

¹³⁵ *Id.* at 132.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 148; see Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes: United States v. Klein Revisited*, 1981 Wisc. L. Rev. 1189 (1981).

¹³⁹ Act of July 12, 1870, ch. 251, 16 Stat. 230.

¹⁴⁰ *Id.*

as . . . infringing the constitutional power of the Executive.”¹⁴¹ Congressional acts that attach adverse consequences to acceptance of a pardon, as in *Klein*, violate Article II.

Certainly, presidential pardons do not escape politics, as events during the administrations of Andrew Johnson,¹⁴² Gerald Ford,¹⁴³ and Bill Clinton¹⁴⁴ amply reflect.¹⁴⁵ As a constitutional matter, however, the wisdom of pardons cannot be second-guessed by either Congress or the courts.¹⁴⁶

Greater debate arises as to whether other presidential powers perform a similar checking function. To me, the President’s appointment power in part can be viewed as performing a comparable checking function under the system of separated powers. Given that Congress creates offices, permitting Congress also to appoint individuals to fill those offices would accord it excessive power to influence execution of the law. Congress can always rescind a delegation to an agency, revise it, or defund it, but it cannot directly appoint or remove officials exercising significant authority under the laws of the United States. If Congress had such authority, its incentive to delegate authority to individuals it controlled as opposed to making policy itself would be powerful. The Court’s decision in *Buckley v. Valeo*,¹⁴⁷ which invalidated Congress’s decision to vest in its leaders appointment authority over four of six members serving on the Federal Election Commission, can be understood from that perspective. Direct congressional exercise of the appointment authority is presumptively unconstitutional.¹⁴⁸

In my view, however, not all aspects of appointments should be off limits to Congress. For starters, Congress has much leeway under the Constitution to determine whether to vest the appointment of inferior officers in the President or heads of departments.¹⁴⁹ Congress’s power to create offices carries with it some power to specify the qualifications of those to fill the office, the length of term, and the like. In these cases, therefore, there is no presumption of unconstitutionality.

¹⁴¹ *Id.*

¹⁴² *See, e.g.,* *Carlisle v. United States*, 83 U.S. (16 Wall.) 147 (1872).

¹⁴³ *See, e.g.,* Proclamation 4311: Granting Pardon to Richard Nixon, 39 Fed. Reg. 32,601 (Sept. 13, 1974).

¹⁴⁴ *See, e.g.,* BARBARA OLSON, *THE FINAL DAYS* 121–23 (2001).

¹⁴⁵ *See* KRENT, *supra* note 1, at 201–02.

¹⁴⁶ Although all congressional interference with the President’s pardon authority is presumptively unconstitutional, there may well be some enactments that survive challenge, such as a congressional determination that all pardons be reported to Congress for it to study in determining whether to revise sentences.

¹⁴⁷ 424 U.S. 1 (1976).

¹⁴⁸ *See, e.g.,* *Morrison v. Olson*, 487 U.S. 654, 704 (1988).

¹⁴⁹ *See* CONST. art. II, § 2, cl. 2.

An accommodation between executive and congressional power must instead be reached.¹⁵⁰

Similarly, in the removal context, Congress's power to remove executive branch officials directly can be understood to displace a key check in the Constitution: Congress cannot control execution of the law.¹⁵¹ On the other hand, congressional restrictions on the Executive's removal authority may require a case-by-case determination because no direct threat to the system of checks and balances exists. Dependent upon a judicial understanding of the importance of unified law enforcement under Article II, a court might find the restriction unconstitutional. *Morrison v. Olson* reflects the current Court's belief that the Constitution does not enshrine the norm of unified law enforcement as a preeminent value.¹⁵²

Admittedly, the approach sketched above would require courts—and the coordinate branches—to ascertain in each case whether the congressional enactment robbed the President of a critical checking function. There is no consensus as to which aspects of the Constitution constitute the most important checks and balances. For instance, judges will differ as to whether the Commander-in-Chief power serves a comparable role,¹⁵³ or whether the President's duty to "take Care that the Laws be faithfully executed"¹⁵⁴ can be viewed as a critical check. Senatorial conditions on treaties, in my view, are not presumptively unconstitutional nor would be a congressional ban on sending envoys. Others may disagree.¹⁵⁵

Nonetheless, the checks and balances prism provides courts with a way to make sense of at least some conflicts among the branches and, over time, pave the way for a more intelligible framework within which to assess which congressional intrusions on the executive branch should be upheld. Judicial analysis should hinge not on ad

¹⁵⁰ Note that, to the extent that Congress can prevent the President from removing an executive official, exercise of an unfettered appointment authority is more critical to the balance of powers in the Constitution.

¹⁵¹ See *Bowsher v. Synar*, 478 U.S. 714 (1986).

¹⁵² See 487 U.S. at 733–34.

¹⁵³ Some academics have argued to the contrary that, like the "take care" clause, the Commander in Chief Clause vests in the President only such power that Congress sees fit to leave in his hands. See, e.g., Curtis Bradley et al., *On NSA Spying: A Letter to Congress*, 53 N.Y. REV. OF BOOKS, Feb. 9, 2006, at 43–44. I am as dubious of the congressional absolutist position as I am of Professor Prakash's proexecutive stance. Accommodations must be made between the powers of Congress and the independent authority of the President in the sphere of war.

¹⁵⁴ U.S. CONST. art. II, § 3, cl. 1.

¹⁵⁵ See, e.g., Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515 (1991) (arguing for limited senatorial power to graft conditions onto treaties); Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571 (1991) (same).

hoc balancing but on a deeper understanding of how each constitutional power implicated fits within a system of separated powers.

Moreover, the checks-and-balances approach could provide an appropriate lens with which to view other separation-of-powers conflicts under the Constitution. There is little reason to think that congressional intrusions into presidential powers should be approached any differently than presidential intrusions into the congressional or judicial domain. Congressional enactments that bypass the President's veto power should be no more prohibited than presidential measures circumventing Congress's power to override a veto. Both may be constitutional but should be approached with caution in light of the fundamental importance of the veto power.

Indeed, in *Coleman v. Miller*,¹⁵⁶ the Supreme Court manifested a similar tack. The case arose from a challenge to the Kansas legislature's approval of a proposed congressional amendment to the Constitution known as the Child Labor Amendment.¹⁵⁷ Members of the Kansas legislature who opposed the amendment argued that, because the legislature had previously rejected the proposal, it could not thereafter approve it.¹⁵⁸ The United States Supreme Court, under the aegis of the political question doctrine, disclaimed authority to resolve the issue because the Constitution committed resolution of the matter to Congress itself.¹⁵⁹ The Court's reasoning, however, was narrower. It stressed that, because the Article V power to amend the Constitution was intended as a check on the judiciary, it was for Congress rather than for the Court to determine "whether by lapse of time its proposal of the amendment had lost its vitality prior to the required ratifications."¹⁶⁰ Thus, by focusing on the role of the contested powers in our constitutional system, we can hope for a more sophisticated dialogue.

CONCLUSION

Professor Prakash's review highlights the need for a more nuanced approach to analyzing and resolving clashes between Congress and the President. His advocacy of executive absolutism, however, is as implausible as it is unpalatable. Congress through Article I can legislate in areas trenching upon executive powers. Overlap between congressional and executive powers is inevitable because the Constitution does not allocate unique functions to each branch. Moreover, privileging all executive assertions of authority would vest

¹⁵⁶ 307 U.S. 433 (1939).

¹⁵⁷ *See id.* at 435–36.

¹⁵⁸ *See id.* at 447.

¹⁵⁹ *See id.* at 458–60.

¹⁶⁰ *Id.* at 456.

in the President a dispensation power: Presidents would become emboldened to act irrespective of congressional restraint. The lessons of *Little v. Barreme* and *Youngstown* should not be jettisoned.

Instead, clashes between Congress and the Executive should be resolved when possible by reference to the checks-and-balances principle animating the Constitution. Actions by one branch that rob the coordinate branch of a fundamental check presumptively should be unconstitutional. Thus, the Court's approach in *Morrison v. Olson* should be refocused so that ultimate resolution of clashes among the three branches stems not from judicial notions of reasonableness or sufficiency but from the principles underlying the Constitution itself.